No. 238

In the Supreme Court of the United States

OCTOBER TERM, 1952

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GAMBLE ENTERPRISES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court below (R. 395) is reported at 196 F. 2d 61. The findings of fact, conclusions of law, and order of the Board (R. 370-385, 343-367) are reported at 92 NLRB 1528.

JURISDICTION

The judgment of the court below was entered on May 9, 1952 (R. 395). The petition for a writ of certiorari, filed on July 30, 1952, was granted on

October 13, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether it is an unfair labor practice under Section 8 (b)(6) of the National Labor Relations Act for a labor organization to attempt to secure the employment of its members for the performance of actual work, and to have the employer agree to pay for the work done, where it is the employer's position that he does not want or need the work.

STATUTE INVOLVED

The pertinent provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 141, *et seq.*), is set forth *infra*, pp. 15-16.

STATEMENT

After the usual proceedings under Section 10 of the National Labor Relations Act, the National Labor Relations Board on January 24, 1951, issued an order (R. 379) dismissing an unfair labor practice complaint (R. 6-8) which, based on charges filed by Gamble Enterprises, Inc. (R. 1-3, 4-5), alleged that Local No. 24, American Federation of Musicians, had engaged in conduct which violated Section 8 (b)(6) of the Act. Section 8 (b)(6) makes it an unfair labor practice for a labor organization to attempt to cause an employer to pay or agree to pay money or other thing of value, "in the nature of an exaction, for services which are not performed or not to be performed." The facts

pertinent to the complaint may be summarized as follows:

I. The Board's Findings of Fact

Before the decline of vaudeville in 1940, the Palace Theatre in Akron, Ohio, one of a chain of theatres owned by the Company, regularly employed a local orchestra of nine musicians, all members of the Union, to provide music for stage acts performing at the Palace. During this pre-1940 period, the performance of vaudeville acts was a regular part of the theatre's program. When, in addition to vaudeville acts, a traveling band appeared on the stage of the Palace, the local or "house" orchestra played from the pit for the vaudeville acts and, at times, augmented the traveling band. (R. 61, 75, 79, 207, 208-210).

Since 1940, the showing of vaudeville has been abandoned, and the Palace Theatre has been used primarily for the exhibition of motion pictures, occasionally supplemented by the appearance of traveling bands of national reputation for limited engagements (R. 346, 371-372; 101-103). The local musicians, no longer employed on a regular basis, continued to hold periodic rehearsals at the theatre and were available for such services as might be required, but they provided music for only a few performances during the three years preceding July, 1947 (R. 347, 372; 64-65, 67, 69-70, 79-80, 84-85, 213-214). Nevertheless, between 1940 and July, 1947, whenever a traveling band appeared at the theatre, the members of the local orchestra

the ground that the services of local musicians were unnecessary, as well as economically infeasible (R. 350; 155-156, 160). The Company offered to employ a local orchestra whenever a show was presented at the Palace which was not accompanied by a traveling band, but it refused to give any assurances concerning the number of such presentations (R. 350-351, 373; 148-149, 217-218). No agreement was reached by the parties at the May 8 meeting (R. 351, 373; 44-45, 155, 160-161, 220-221).

On June 24, the theatre management informed the Union that it intended to engage traveling bands with accompanying acts, making it clear that the performance of local musicians on such occasions would be unacceptable (R. 351-352; 338-339). A month later the Company contracted with a Chicago booking agency for the appearance of "Roy Acuff and his Grand Ole Opry" at the Palace (R. 353, 373; 116). The manager of the Acuff show subsequently inquired of the Union's representative, by wire and telephone, whether the Union had any objection to the performance of the Acuff band. In each instance, the Union replied that no agreement had been reached with the theatre management (R. 354, 373; 51-52, 192-193). The Roy Acuff show did not fill its engagement (R. 354, 373; 116).

At an ensuing meeting between the Company and the Union in December 1949, the management announced that an RKO vaudeville unit, then appearing in Youngstown, Ohio, was available for local bookings and required the services of an orchestra (R. 355-356, 374; 118-119). The Company offered

to book this unit for an appearance at the Palace and to engage the local orchestra to accompany its performance. The Company conditioned this offer on the Union's assent to the subsequent appearance of a traveling band for a separate engagement at which the local orchestra would not perform (R. 356, 374; 118-119, 133-135).[5] The proposal was entirely satisfactory to the Union, which offered to enter into a contract embodying these terms (R. 356, 374; 120, 194, 241-243). The proposed arrangement never went into effect, however, for it was vetoed by the Company's New York office (R. 356, 374; 120, 194-195), which determines the policies governing the operation of the theatre and exercises ultimate control over matters pertaining to labor relations (R. 346, 374; 100, 139-140).

Insofar as the record shows, no further negotiations of any consequence have occurred between the Company and the Union (R. 356; 195). However, at oral argument before the Board, Union counsel stated that the Company and the Union "have executed a new agreement and shows are again being held at Akron employing local people under an arrangement very similar to what we were speaking about, namely, the employment of our people on the basis of 50 percent of the engagements which the theater schedules, a guarantee of such employ-

[5] As the theatre manager testified, he was and is anxious to book shows of the RKO vaudeville unit type into the Palace, and that, in spite of his lack of experience with such shows, he was perfectly willing to try them, for "it would fulfill [the Union's] demand to give the local musicians work" (R. 118-119, 128).

ment." Transcript of Oral Argument Before the Board, p. 87.[6]

II. The Board's Conclusions and Order

The Board found that, after Section 8 (b)(6) went into effect in August 1947, the Union sought only to secure the employment of its members for the performance of actual work (R. 375). The Board held that, since the prohibition of Section 8 (b) (6) is limited to causing payment "for services which are not performed or not to be performed," that Section did not proscribe union activity aimed at securing employment and payment for the performance of actual work (R. 375-378). Because, as it read the statute, the character of the "services" is qualified only by the requirement that it be "performed," the Board rejected as immaterial the trial examiner's recommended finding (R. 361-362) that the services proffered by the Union were unwanted and unneeded by the Company (R. 376-378).[7] Accordingly, the Board dismissed the complaint against the Union (R. 379).[8]

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[6] A copy of this transcript has been lodged with the Clerk.

[7] The examiner also recommended the finding that the services proffered by the Union were not actually to be performed by the musicians (R. 362-363). The Board rejected this recommendation as totally without support in the evidence (R. 374-375). The court below, while agreeing with the examiner that the services were unwanted and unneeded by the Company, did not disturb the Board's finding that they were actually to be performed. (See pp. 18-26, *infra*).

[8] The examiner had also recommended that the complaint be dismissed (R. 364-366). He premised his recommendation on his finding that the Union had not exerted any coercive economic pressure in aid of its demands, and that therefore the

III. The Court's Decision

The court below agreed with the examiner that the services offered by the Union were unwanted and unneeded by the theatre management as evidenced by its persistent position "that it had no need for such services, did not desire them, and that they would be a detriment rather than an advantage to it" (R. 397). It held that to "force the theatre to pay for services not needed, and of detriment to it was clearly an exaction" (R. 398). It considered immaterial the "assertion of the union that it desires to perform" (R. 398), reasoning that the "dominant purpose" of Section 8 (b) (6) was to safeguard employers from paying for unwanted and unneeded services (R. 398). Accordingly, the court below set aside the Board's order of dismissal and remanded the case to the Board "for further proceedings not inconsistent herewith" (R. 399).

Union did not "attempt to cause" payments "in the nature of an exaction" within the meaning of Section 8(b)(6). The examiner reasoned that the agreement between the name band and the theatre management for the appearance of the name band at the Palace was expressly subject to "all the rules, laws and regulations of the American Federation of Musicians" (R. 364); that the rules of the Federation provided that, in the absence of an agreement between the theatre and the local union, traveling bands make no appearances unless the local union consents (R. 364-365); and therefore, by its contract with the name band, the theatre had assented to the failure of the name band to fill its engagement if no agreement was reached with the local union (R. 365-366). In its disposition of the case, the Board, having found that the end sought by the Union was not prohibited, did not reach the further question whether the means employed by the Union were forbidden by Section 8(b)(6) (R. 371, 376, 383).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that, although a labor organization seeks an agreement for the payment of services actually to be performed, Section 8 (b) (6) of the Act is applicable if it is the employer's position that he does not want or need the services.

2. In failing to affirm the order of the Board dismissing the complaint.

SUMMARY OF ARGUMENT

I

Substantial evidence on the record considered as a whole supports the Board's finding, not disturbed by the court below, that the Union attempted to secure the employment of its members for the performance of actual work. The agreement which the Union sought to reach with the Company was for payment for work actually to be done.

II

A. Under Section 8 (b) (6) of the Act, the performance of work is the sole test of the lawfulness of a demand for employment. Except to require that work be "performed" there is no other statutory criterion qualifying the character of the "services" for which payment may be demanded. The distinction is between labor actually expended and no work. In this case, inasmuch as the Union sought an agreement for the performance of actual work and payment for it, it did not "attempt to

cause an employer to . . . agree to pay . . . for services . . . not to be performed." Nothing in this statutory language suggests that, once it is shown that work is to be done, there is to be a further inquiry into whether the work is wanted or needed by the employer.

B. The legislative history of Section 8 (b)(6), like its text, shows clearly that a union's attempt to secure the employment of its members for the performance of actual work is not forbidden, whether or not the work is wanted or needed by the employer. The House bill, in addition to prohibiting payment for services not to be performed, also prohibited employment of more persons than reasonably required. The Senate bill, on the other hand, contained no regulation of featherbedding. In conference, only that part of the House proposal forbidding payment for unperformed work was adopted and ultimately became Section 8 (b)(6); the independent proposal forbidding unneeded employment was rejected.

There is no doubt that Congress rejected the proposal to regulate unneeded employment because that body thought it unwise and premature to legislate on that subject. In his major address presenting the conference agreement to the Senate (93 Cong. Rec. 6441), and in his written statement submitted contemporaneously (93 Cong. Rec. 6443), Senator Taft explained the reasons for the sharp curtailment of the House bill: (1) The conferees "felt that it was impracticable to give to a board or a court the power to say that so many men are all

right, and so many men are too many. It would require a practical application of the law by the courts in hundreds of different industries, and a determination of facts which it seemed to me would be almost impossible"; (2) "the conferees were of the opinion that general legislation on the subject of featherbedding was not warranted at least until the joint study committee proposed by this bill could give full consideration to the matter"; (3) pending such full study, the conferees were unwilling to go further than to make it "an unlawful labor practice for a union to accept money for people who do not work. That seemed to be a fairly clear case, easy to determine. . . ." Accordingly, except for the "fairly clear case, easy to determine," where a union "accept[s] money for people who do not work," Congress withheld all regulation of featherbedding. See also, 93 Cong. Rec. 6859, 7529.

C. The court below failed to address itself to the irreconcilable dilemma which its interpretation of Section 8 (b)(6) creates and which conclusively shows its error. If, as the court below holds, the employer's want or need for work is pertinent, a decision of this question would be required in every case. It would be necessary either (1) to have the Board decide whether the work is desired or needed, or (2) to permit the employer's unilateral determination to prevail. It is clear that neither alternative was acceptable to Congress, and that it therefore necessarily rejected any criterion of need or want, for it neither found nor prescribed a satis-

factory means of resolving the issue.

D. Congress extended its regulation of featherbedding practices to require that work be performed. But it left to the pressure and persuasion of the bargaining process the determination whether the employer shall accede to a demand for work and the manner in which work should be done to yield the employer the greatest benefit. The court below rejected this view of Congressional policy, stating in effect that Section 8 (b) (6) should be interpreted to reach unneeded or unwanted work as well as unperformed work, because the same vice of featherbedding inheres in both. But to interpret Section 8 (b) (6) in this fashion is to ignore the point at which Congress chose to stop. Congress fully appreciated the distinction between stand-by and make-work practices in featherbedding. Stand-by practices require payment where no work is done. These Section 8 (b) (6) forbids. Make-work practices concern payment for actual work which the employer considers of no value. These Section 8 (b) (6) does not reach. To refuse to follow Congress in this distinction is to fail to appreciate Congress' circumspect approach to featherbedding regulation.

ARGUMENT

Section 8 (b) (6) of the Act provides that it shall be an unfair labor practice for a labor organization or its agents:

> to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature

of an exaction, for services which are not performed or not to be performed."

Unions are thereby prohibited from causing or attempting to cause employers to make payments which (1) are "in the nature of an exaction," and (2) are made "for services which are not performed or not to be performed." Both elements are prerequisites to making out a violation; in the absence of either one, a union engages in no unfair labor practice forbidden by Section 8 (b)(6).

In this case, as the Board found, the Union sought to have its members employed to perform *actual* work. The Board therefore concluded that there was no attempt to cause payment "for services which are not performed or not to be performed."[9] However, the court below held, as the Company contends, that the statutory prohibition is violated if the work actually to be performed is a service which the employer maintains he neither wants nor needs. Accordingly, the primary question presented is whether the statutory phrase—"services which are not performed or not to be performed"—can be expanded to include within its ban services which, though to be performed, are thought by the employer to be unwanted or unneeded.

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[9] As stated (*supra*, p. 10, n. 8), the Board dismissed the complaint on this ground. It did not reach the further questions of the meaning and application of the statutory terms "to cause or attempt to cause [payment] in the nature of an exaction." These separate questions are discussed in the Board's brief in *American Newspaper Publishers Association* v. *National Labor Relations Board*, No. 53, this Term.

In Part I of this Argument we shall show that substantial evidence on the record considered as a whole supports the Board's finding that the Union attempted to secure the employment of its members for the performance of actual work and that the Union at no time relevant to this case attempted to obtain payments for work which was not actually to be performed.

In Part II of this Argument we shall show that where work is to be performed Section 8 (b)(6) does not prevent a union from seeking employment for its members even though the employer maintains that the work is unwanted or unneeded, because (1) the text of Section 8 (b)(6) makes the performance of work the sole test of the lawfulness of a demand for employment; (2) the legislative history of Section 8 (b)(6) similarly establishes that Congress withheld all regulation of featherbedding, except for the requirement that work be performed; (3) if the want or need for work were determinative of the lawfulness of a demand for employment, it would be necessary either that the Board decide this issue or that the employer's determination be accepted as conclusive; neither of these alternatives was acceptable to or adopted by Congress, which provided no means of deciding this issue; and (4) to extend Section 8 (b)(6) beyond requiring the performance of actual work would substitute for Congress' circumspect policy concerning featherbedding regulations a broader approach to the problem of featherbedding than

that which Congress was willing to undertake in the National Labor Relations Act.

I.

Substantial Evidence on the Record Considered as a Whole Supports the Board's Finding That the Union Attempted to Secure the Employment of its Members for the Performance of Actual Work and That the Union at No Time Relevant to This Case Attempted to Obtain Payments for Work Which Was Not Actually to be Performed

The Board found that, subsequent to the effective date of the amendments to the Act, the Union attempted to secure the employment of a local orchestra to engage in the actual rendition of music at the Palace Theatre (R. 374-376). In the court below, the Company contended, however, "that the union never intended that the acts which they offered would in fact be performed" (Br. p. 28). The court below did not disturb the Board's contrary conclusion. This should end the matter. *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 409-410. We anticipate that the company may nevertheless renew this contention. This section of our argument is therefore devoted to showing that, as the Board found, there is no evidence to support the Company's contention, much less evidence of the stature sufficient to detract from the substantial evidence supporting the Board's conclusion considering the record as a whole.

During the course of the 1949 negotiations, the

Union offered several alternative suggestions for the utilization of a local orchestra in the theatre program (*supra*, pp. 5-6). The common denominator of all these proposals, according to Theatre Manager Gamble's own testimony (R. 119, 148), was an insistence by the Union that local musicians be employed to provide musical performances of same type. As Gamble further testified (R. 112-113), the Union was willing to accept employment for its members either concurrently with traveling bands or on separate occasions. In connection with concurrent engagements, the Union suggested that the local orchestra be employed in the theatre pit either to provide music for those vaudeville acts which were not an integral part of the name band ensemble or to play musical selections during intermissions, as well as before and after the scheduled name band performance on stage; in the event that the Company preferred to engage the local orchestra on separate occasions, the Union proposed that its members be given employment in some fixed ratio to the number of appearances made by traveling bands, suggesting that the local musicians perform with vaudeville acts booked by the management. No proposal contemplated that payments were to be made regardless of whether or not the local musicians actually performed, and any speculative inference to the contrary is foreclosed by the testimony of Theatre Manager Gamble himself (R. 148):

> Q. Now, on all of these occasions, in which [Union] members were to appear or play,

[the Union representative's] suggestion was that his members actually work on these occasions, isn't that true?

A. I would imply that.

* * * * *

Q. But he said that he wanted his people to work on those occasions?

A. That is right.

Q. He never asked you to pay them for not working, for not being there?

A. That is right.

Accordingly, it is unquestionable that each of the Union's proposals embraced the actual rendition of music.

The impasse which did occur between the Company and the Union was, as Gamble testified (R. 114, 148-149), due to the Company's refusal to give the Union any assurances concerning the frequency with which engagements would be offered to local musicians. Nevertheless an agreement satisfactory to the Company's local management and the Union was subsequently reached whereby local musicians would appear with a traveling vaudeville unit requiring the services of an orchestra, and, following this engagement, the Company would have the option of engaging a name band for a separate appearance at which the local musicians would neither perform nor be paid (*supra*, pp. 8-9). Although the Union was willing to enter into a contract to this effect, the plan was rejected by the Company's New York office (*supra*, p. 9).

Thus, the facts of record indisputably show that the Union was seeking, and except for the veto of the Company's New York office, would have obtained actual employment for its members.

The Company, however, has embraced as its own the view of the trial examiner that no actual performance of work was sought by the Union (Br. below, p. 31). In harmony with the Board's conclusion, the examiner found as basic facts "that the [Union] was primarily interested in the *employment* of its members by the theatre management. Its members were ready and willing to provide music for the Palace Theatre if management of the theatre would contract for their services. The [Union] made several proposals as to the character and scope of the proffered services, and each of these *appeared* to contemplate actual performance. At no time did the [Union] propose, in so many words, that the local orchestra be paid for services not rendered" (R. 361). Nevertheless the examiner concluded that the Union sought payment "even though the local orchestra did not actually play any performances," arguing that, "True, this was never stated in so many words, but the persistence with which the [Union] insisted that the theatre management bargain on the employment of the local orchestra simultaneously with the appearance of the traveling bands, discloses the true intent" (R. 362). This inference of the examiner, wholly incompatible with the primary facts he found, was rejected by the Board as insupportable (R. 374-375).

First, the basis of every proposal offered by the Union was that the local orchestra provide music at times which would not conflict with the usual performances of traveling bands. By one of these proposals, upon which the Company and the examiner mainly rely, the local orchestra, if appearing simultaneously with a name band, was to play overtures, intermissions and "chasers." Since the name band and the local orchestra were to play at different times, no conflict in their respective renditions was in issue. Furthermore, the local orchestra was to play from the pit, and, as is customary, the name band was to play from the stage, so that no space difficulty was presented. Indeed, prior to 1940, when the local orchestra performed on a regular basis, this was the precise arrangement which obtained when a traveling band appeared (*supra*, p. 3). Consequently the mere appearance of the local orchestra and the name band on the same show affords no basis for skepticism as to the sincerity of the Union's offer to play overtures, intermissions, and "chasers." And it certainly offers no basis for skepticism as to the Union's sincerity in offering to provide musical accompaniment for vaudeville acts, not an integral part of the name band's ensemble, which were booked to appear together with the name band (*supra*, p. 6).

Second, the Company has professed that the Union's position would be more credible if "the union had attempted to negotiate the employment of its people at times other than those at which name bands were simultaneously employed" (Br.

below, p. 30). This was precisely one of the alternatives which the Union proposed (*supra*, p. 6), which the Company's local management was ultimately willing to accept (*supra*, pp. 8-9), but which the Company's New York office rejected (*supra*, p. 9). To prevent being hoisted by its own petard, the Company has acknowledged the existence of this proposal by the Union, and then minimized it by arguing that "the union [1] never agreed to such an arrangement, [2] was not primarily interested in it, [3] exerted the strongest economic pressure at its command for over a year before being reduced to discussing it at all and, significantly, [4] still geared its demands to hiring of the outside name bands, insisting upon a fixed ratio between the vaudeville shows and the name-band engagements * * *" (Br. below, p. 30). As to [1], the Union did agree to such an arrangement. As to [2], since the Union agreed, it was obviously "interested in it." As to [3], there is no evidence to support this statement; on the contrary, the Union proposed this arrangement in May 1949 (*supra*, pp. 5-6), and it was not until eight months later in December that the Company's local management accepted it only to have it rejected by the New York office; thus, it was the Company that was exerting "the strongest economic pressure at its command * * * before * * * discussing it at all." As to [4], of course the Union was gearing its work demands to the appearance of the name band, for the only effective economic lever available to it to secure the employment of its members with some regularity was the Com-

pany's desire to present name bands. Consequently, requests for local work advanced at any other time were predestined to failure, since only the incentive of presenting a name band would induce the Company to employ local musicians. It seems evident that the Union's recourse to an effective means of inducement to obtain employment cannot mean it was not interested in performing actual work.

Third, the persistence with which the Union sought in negotiations to obtain work cannot rationally imply that the Union was seeking to obtain payments for its members regardless of whether or not they actually performed. Either party is "free frankly to state the terms upon which he may yield and those upon which he will not yield."[10] The Union's persistence in attempting to secure some guarantee concerning the frequency with which its members would be employed, the crux of the dispute, was matched by the insistence with which the Company refused to grant such assurance. The length of time involved in the negotiations, as well as the frequency with which they occurred, the many compromises offered by the Union with regard to the type of work to be performed by its members, and the Union's demonstrated willingness to enter into a contract in accordance with its proposals, afford indicia of good faith which have

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[10] *National Labor Relations Board* v. *P. Lorillard Co.*, 117 F. 2d 921, 924 (C.A. 6), reversed on other grounds, 314 U.S. 512. See, also, *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 404.

been long recognized.[11] Lest the good faith of all persevering bargaining be suspect, to persist in seeking a lawful demand cannot imply that an unlawful alternative is also acceptable.

Fourth, no credibility issue is involved in the examiner's rejected inference. There is no conflict in the evidence, and the examiner's primary findings, but not his inference from them, are in complete accord with the Board's conclusion that the Union's objective was to secure actual employment and not to reinstate the preamendment system of obtaining payments for no work. Since the significance of an examiner's report "depends largely on the importance of credibility in the particular case" (*Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 496), and since the examiner's inference here does not rest on the "superior advantages of the examiner who heard and saw the witnesses for determining their credibility" (*Ohio Associated Telephone Co.* v. *National Labor Relations Board,* 192 F. 2d 664, 668 (C.A. 6)), the examiner's rejected inference is entitled to no independent weight as a factor detracting from the Board's conclusion. *National Labor Relations Board* v. *Wiltse,* 188 F. 2d 917, 925 (C.A. 6), certiorari denied *sub nom. Ann Arbor Press* v. *National Labor Relations Board,* 342 U. S. 859; *National*

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[11] *National Labor Relations Board* v. *Sands Mfg. Co.*, 96 F. 2d 721, 725, 726 (C.A. 6), affirmed, 306 U.S. 332; *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 37 (C.A. 3); *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. 2d 452, 459-460 (C.A. 7), certiorari denied, 317 U.S. 650.

Labor Relations Board v. *Chautauqua Hardware Corp.*, 192 F. 2d 492, 494 (C. A. 2); *National Labor Relations Board* v. *Globe Wireless*, 193 F. 2d 748, 751-752 (C. A. 9). In any event, whatever independent weight the examiner's conclusion should carry has been fairly and rationally offset by the Board's evaluation, and it is the Board's findings, not those of the examiner, which the statute states "shall be conclusive" if "supported by substantial evidence on the record considered as a whole * * *" (Sec. 10(e) of the Act).

In sum, the Board's conclusion, which was not disturbed by the court below, is clearly supported by substantial evidence on the whole record. Indeed, if the evidence of the Union's conduct in this case fails to establish that it sought actual work, it is difficult to know what more a union can do to show the *bona fides* of its purpose.

II.

Section 8(b)(6) of the National Labor Relations Act Does Not Prevent a Labor Organization from Attempting to Secure Employment for its Members Even Though the Employer Maintains That the Work to be Covered by That Employment is Neither Wanted Nor Needed

A. The Text of Section 8(b)(6) Makes the Performance of Work the Sole Criterion

The requirement that the work be "performed" is the sole statutory criterion qualifying the character of the "services" for which payment may be

demanded. The distinction is between labor actually expended and no work. As stated by the Court of Appeals for the Seventh Circuit, "the only practice covered by § 8 ((b)(6) was the practice of demanding money where no work had been done." *American Newspaper Publishers Association* v. *National Labor Relations Board,* 193 F, 2d 782, 801, certiorari granted, No. 53, this Term. It is therefore immaterial that the product "was not ordinarily used by the employer," and was thus worthless to him, for "the necessary work to compose it was actually done by the employee. Requiring that the employer pay for such work was not a violation of Section 8 (b)(6)." *Id.*, at 802. And the Court of Appeals for the Second Circuit, expressly following the decision of the Court of Appeals for the Seventh Circuit, has agreed that Section 8 (b)(6) reaches only the type of practice where the payment demanded is unrelated to the actual doing of work. *Rabouin* v. *National Labor Relations Board,* 195 F. 2d 906, 912, 913, affirming, 87 N.L.R.B. 972, 977-978, 1014-1015.[12]

In the instant case, the Union sought an agreement for the performance of actual work and payment for it, and therefore it did not in the statutory language "attempt to cause an employer to * * * agree to pay * * * for * * * services not to be performed." Moreover, had the Company ac-

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[12] The Court of Appeals for the Second Circuit affirmed the Board's decision that it was no violation of Section 8(b)(6) for a union to demand that an employer pay an employee for wages he lost because of a wrongful denial of employment.

cepted the Union's proffer of work and had that work actually been performed, it is clear that payment of the musicians for accompanying vaudeville acts or for playing intermissions, overtures, and "chasers" would be for "services * * * performed." In that event the Union could not be charged in the statutory language with causing the employer "to pay * * * for services which are *not* performed." There is no difference between the two situations contemplated by the present and future tenses, for the attempt of a union to secure pay for services must be judged by the same standard regardless of whether the work has already been performed or is to be performed in the future. Under Section 8 (b) (6), "to pay" is coequal with "agree to pay" and services "which are not performed" are coequal with services "not to be performed." If obtaining payment for work already done is permissible, it must be no less permissible to seek an agreement to do such work in the future and to be paid for it. In either case the only test of the character of the service is whether or not it is performed or to be performed.

To add to the requirement that the work be done the further requirement that the employer want or need it is to interpolate into Section 8(b)(6) an additional qualification that its words do not express. Had Congress intended such an enlarged purpose, it knew how to state it clearly. Fourteen months before Section 8(b)(6) was passed, Congress enacted the Lea Act to regulate featherbedding practices in radio broadcasting (*infra*,

p. 34, n. 16). In the Lea Act, 60 Stat. 89, in addition to prohibiting the use of compulsive means to obtain payment "for services * * * not to be performed," Congress also forbade the compulsive securing of employment of workers "in excess of the number of employees *needed*" by the employer "to perform actual services." (Emphasis supplied.) Indeed, in the House Bill, which was the immediate predecessor to Section 8(b)(6), the identical distinction was drawn (*infra*, pp. 34-35). Thus, when Congress has wished to regulate employment in terms of need, it has used precise words to effect that purpose. In Section 8(b)(6) as adopted, however, Congress incorporated only the requirement that the services be performed, and omitted any requirement that employment not be in larger numbers than necessary.

The court below, nevertheless, treated the phrase "for services which are not performed or not to be performed" as surplusage. It read Section 8(b)(6) as prohibiting causing or attempting to cause payments "in the nature of an exaction," without more. Having thereby left at large what is "in the nature of an exaction," the court below innovated as a standard the want or need of the employer or a blend of the two. The substituted standard makes Section 8(b)(6) read as a prohibition against causing or attempting to cause an employer to agree to pay "for services which, although they are performed or to be performed, are unwanted or unneeded by the employer."

This interpretation of Section 8(b)(6), which

we shall show is incompatible with its history and policy (*infra*, pp. 33-68), cannot stand even as a textual reading. To express the meaning given it by the court below, the obvious way to have written Section 8(b)(6) (as Congress wrote it in the Lea Act and as the House wrote it in its bill), would have been to add to the phrase, "for services which are not performed or not to be performed," the further phrase, "or for services which are unwanted or unneeded by the employer." But to add this phrase when it does not appear in the section is to legislate in the guise of interpretation. It is "beyond the judicial power of innovation to supply a direct prohibition by construction." *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 508.

The Company has urged in justification of the result reached by the court below, however, that infused in the word "services" is the concept of the employer's want or need for the work, and that Section 8(b)(6) should therefore be construed as if there had been expressly added to the word "services" the qualification "wanted or needed by the employer." Such an emendation cannot be incorporated into the text of Section 8(b)(6) without basically transforming its meaning.

Under the proposed revised reading, Section 8(b)(6) would prohibit compelled payment "for services, wanted or needed by the employer, which are not performed or not to be performed." This revision, instead of helping the Company, would actually contract the protection extended by Section 8(b)(6) for the employer would then be

safeguarded against the nonperformance only of wanted or needed services, and would be vulnerable to demands for unperformed services which are also unwanted and unneeded—in the face of the manifest Congressional purpose to condemn demands for payments for unperformed services.

The second step which must be taken to achieve the result reached by the court below from a literal standpoint is to make a further revision. At the least Section 8(b)(6) must be read to prohibit compelled payment "for services, unwanted or unneeded by the employer, which are not performed or not to be performed." In order to make out a violation under this reading however, it would be necessary to show, not only that services are unperformed, but also that the services are unwanted or unneeded. This revision, instead of adding to the scope of the employer's protection under Section 8(b)(6), detracts from it, for it requires proof that the services are unwanted or unneeded, a prerequisite which Section 8(b)(6) does not otherwise express, and yet leaves untouched the critical requirement of nonperformance. This distortion obviously would not help the Company in this case. For even if it could show that the services offered by the Union were unwanted or unneeded by it, the Company still could not show that the services were not to be performed, and nonperformance remains an indispensable element of the offense.

The third possible permutation is to interpret Section 8(b)(6) as precluding payment "for services, unwanted or unneeded by the employer, even

if they are performed or to be performed." By this revision, the criterion of nonperformance, the single standard set out by Congress, is eliminated from the Section altogether.

The upshot of these literal amendments is that the word "services' is qualified by reading "want or need" into the section and by reading "performance" out of the section. The short of the matter is that the result which the Company seeks can be obtained only if the sole test Congress has provided —nonperformance—is read out of the statute. Such a construction is patently untenable.

To justify so torturing the text of Section 8(b)(6), the Company has urged that the word "services" has an absolute dictionary definition, meaning work wanted or needed by the employer, and that the section must be construed to fulfill this meaning. But the dictionary does not give a certain meaning; among the definitions contained in standard dictionaries, some favor the Company's view, others the Board's and still others accord with neither.[13] To look to the dictionary is to look in vain. In any event, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary. . . ." Judge Learned Hand in *Cabell* v. *Markham*, 148 F.2d 737, 739 (C.A. 2). Moreover, even if the word "services" had an absolute dictionary meaning denoting work wanted or needed by the employer, it is clear

[13] *E.g.*, Webster's New International Dictionary (2d ed., unabridged); Webster's New World Dictionary of the American Language (Encyc. Ed., 1951); Allen's Synonyms and Antonyms (edited by T. H. Vail Motter, 1938).

that it has no such absolute legal meaning. As the court below had occasion to state in an earlier case, the word "services" is not restricted to the situation "when some physical or mental effort is expended by the employee on behalf of the employer" (*Nierotko* v. *Social Security Board,* 149 F. 2d 273, 276), and in affirmance this Court similarly rejected the view that "services" "can be only productive activity" (*Social Security Board* v. *Nierotko,* 327 U.S. 358, 365). Instead, "services" as a legal term "has different meanings according to the sense in which it is used. And the sense in which it is used must be determined from the context."[14] Looking to the context, we shall show that Congress in its deliberations used "services" as synonymous with work, and that in employing the phrase "for services which are not performed or not to be performed," Congress meant to require only that work be done.

B. The Legislative History of Section 8(b)(6) Confirms the View That the Performance of Work is the Sole Criterion

The legislative history of Section 8 (b) (6) of the Act, like its text, shows clearly that a union's attempt to secure the employment of its members for the performance of actual work is not forbidden whether or not the employer maintains that he wants or needs the work.

Section 8 (b) (6) originated in the House version

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[14] *State ex rel. King* v. *Board of Trustees,* 192 Mo. A. 583, 588, 184 S.W. 929.

of the bill which became the amended act.[15] Sponsored by Congressman Hartley, it embodied a comprehensive antifeatherbedding program, derived in large measure from the Lea Act (60 Stat. 89, 47 U. S. C. 506), prohibiting certain featherbedding practices in the radio broadcasting industry.[16] Section 12 (a)(3)(B) of the House Bill outlawed union activity directed toward compelling employer accession to any of five specified featherbedding practices, defined in Section 2 (17) as follows:

> The term "featherbedding practice" means a practice which has as its purpose or effect requiring an employer—
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> (A) to employ or agree to employ any person or persons in excess of the number of employees reasonably required by such employer to perform actual services; or
>
> (B) to pay or give or agree to pay or give

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[15] H. R. 3020, 80th Cong., 1st Sess., April 18, 1947, in 1 Leg. Hist. 158. "Leg. Hist." refers to the two volume edition of the Legislative History of The Labor Management Relations Act, 1947 (Gov. Print. Off., 1948).

[16] Enacted by Congress the previous year, the Lea Act provides, in pertinent part, that it shall be unlawful to force a broadcaster:

"(1) to employ or agree to employ * * * any person or persons in excess of the number of employees needed by such licensee to perform actual services; or

"(2) to pay or give or agree to pay or give any money or other thing of value in lieu of giving, or on account of failure to give, employment to any person or persons * * * in excess of the number of employees needed by such licensee to perform actual services; or

"(3) to pay or agree to pay more than once for services performed * * *; or

"(4) to pay or give or agree to pay or give any money or other thing of value for services * * * which are not to be performed * * *."

any money or other thing of value in lieu of employing, or on account of failure to employ, any person or persons, in connection with the conduct of the business of an employer, in excess of the number of employees reasonably required by such employer to perform actual services; or

(C) to pay or agree to pay more than once for services performed; or

(D) to pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of a business, which are not to be performed; or

(E) to pay or agree to pay any tax or exaction for the privilege of, or on account of, producing, preparing, manufacturing, selling, buying, renting, operating, using, or maintaining any article, machine, equipment, or materials; or to accede to or impose any restriction upon the production, preparation, manufacture, sale, purchase, rental, operation, use, or maintenance of the same, if such restriction is for the purpose of preventing or limiting the use of such article, machine, equipment, or materials.

Section 12(b) of the House bill conferred on any person injured by a featherbedding practice the right to sue the offender in a federal district court to "recover the damages sustained by him" as a result of the practice. Section 12 (d) subjected the offender "to deprivation of rights" under the National Labor Relations Act.

The House report accompanying this proposed

legislation, which it described as "substantially less drastic than the Lea bill,"[17] attributed to the Lea Act the objectives of eliminating those practices whereby an employer is required "to hire people who do no work, to pay for people the employers do not hire, and to hire more people than the employers have work for." H. Rep. No. 245, 80th Cong., 1st Sess., 25, in 1 Leg. Hist. 316. No greater objectives can therefore be ascribed to the House bill. As we shall see, during its legislative evolution only the objective of eliminating compelled payment to "people who do not work" survived.

The Senate version of the bill which became the amended act contained no regulation of featherbedding.[18] To resolve the wide divergence between the House and the Senate on the subject of featherbedding, this difference, among others, was referred to Conference.

The conferees "were of the opinion that general legislation on the subject of featherbedding was not warranted" (93 Cong. Rec. 6443, in 2 Leg. Hist. 1540). Except for the retention of clause (D) of the House bill banning payment for unperformed services (*supra*, p. 35), which ultimately became Section 8 (b)(6) in its present form, the House

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[17] This description is presumably explained by the criminal sanctions provided in the Lea Act as distinct from the civil sanctions contained in the House bill.

[18] H. R. 3020, 80th Cong., 1st Sess., May 13, 1947, in 1 Leg. Hist. 226. H.R. 3020 was passed by the Senate in name only, for the bill was amended by substituting the language of S. 1126, 80th Cong., 1st Sess., April 17, 1947, in 1 Leg. Hist. 99, introduced by Senator Taft, for all provisions following the enacting clause. S. 1126 made no reference to featherbedding.

bill's regulation of featherbedding was scrapped *in toto*. Included in this deletion was the prohibition in clause (A) against requiring an employer to hire "persons in excess of the number of employees reasonably required by such employer to perform actual services" (*supra*, p. 34). Congress thus rejected a straightforward proposal to regulate unneeded employment.

There is no doubt that when Congress rejected the House bill's prohibition against unnecessary work it did so on the merits and not because it believed that the additional prohibition was mere surplusage. In his major address presenting the conference agreement to the Senate, Senator Taft explained the reason for the sharp curtailment of the House bill (93 Cong. Rec. 6441, 2 Leg. Hist. 1535):

> There is one further provision which may possibly be of interest, which was not in the Senate bill. The House had rather elaborate provisions prohibiting so-called featherbedding practices and making them unlawful labor practices. *The Senate conferees, while not approving of featherbedding practices, felt that it was impracticable to give to a board or a court the power to say that so many men are all right, and so many men are too many. It would require a practical application of the law by the courts in hundreds of different industries, and a determination of facts which it seemed to me would be almost impossible.* So we declined to adopt the provisions which are now in the Petrillo Act [Lea Act]. After all,

that statute applies to only one industry. Those provisions are now the subject of court procedure. Their constitutionality has been questioned.[19] *We thought that probably we had better wait and see what happened*, in any event, even though we are in favor of prohibiting all featherbedding practices. However, *we did accept one provision which makes it an unlawful labor practice for a union to accept money for people who do not work. That seemed to be a fairly clear case, easy to determine* * * *. [Emphasis supplied.]

Senator Taft's written statement submitted contemporaneously reiterated the limited reach of Section 8 (b)(6) (93 Cong. Rec. 6443, in 2 Leg. Hist. 1540):

> Section 8 (b)(6) of the conference agreement covers a matter with which the House bill dealt extensively under the topic of featherbedding practices. * * * While the Senate conferees were in sympathy with the objectives of this portion of the House bill, it seemed to them that *it was almost impossible for courts to determine the exact number of men required in hundreds of industries and all kinds of functions.* The provisions in the Lea Act from which the House language was taken are now awaiting determination by the Supreme Court, partly because of the problem arising from the term "in excess of the number of employees reasonably required." Therefore, *the con-*

[19] This was a reference to the litigation culminating in *United States* v. *Petrillo*, 332 U.S. 1.

> *ferees were of the opinion that general legislation on the subject of featherbedding was not warranted at least until the joint study committee proposed by this bill could give full consideration to the matter.* Since the matter of exacting money for services not to be performed borders definitely on extortion, the conferees agreed to the insertion of a paragraph (sec. 8 (b) (6)) which makes it an unfair labor practice to cause or attempt to cause employers to pay money under such circumstances. [Emphasis supplied.]

The route which Congress travelled to arrive at Section 8 (b) (6) in its present form could not be more clearly marked. (1) The conferees "felt that it was impracticable to give to a board or a court the power to say that so many men are all right, and so many men are too many. It would require a practical application of the law by the courts in hundreds of different industries, and a determination of facts which it seemed . . . would be almost impossible"; (2) "the conferees were of the opinion that general legislation on the subject of featherbedding was not warranted at least until the joint study committee proposed by this bill could give full consideration to the matter"; (3) pending such full study, the conferees were willing to go no further than to make it "an unlawful labor practice for a union to accept money for people who do not work. That seemed to be a fairly clear case, easy to determine . . ." Accordingly, except for the "fairly clear case, easy to determine," where a

union "accept [s] money for people who do not work," Congress deliberately withheld all regulation of featherbedding. "Thus, the legislative history makes it clear that labor unions remain free to press for make-work devices and to oppose the introduction of labor-saving machinery, but that it would be an unfair labor practice to introduce stand-by arrangements or otherwise secure payments for which no work at all is required." Cox, *Some Aspects of The Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 289-290 (1948).

Nevertheless, the court below expanded the scope of Section 8 (b) (6) to include unwanted or unneeded work within its ban. In support of this enlargement, the court relied on a remark made by Senator Taft, which, in the court's view, illuminates its "dominant purpose" (R. 398). This remark is (93 Cong. Rec. 6446, in 2 Leg. Hist. 1545):

> It is intended to make it an unfair labor practice for a man to say, "You must have 10 musicians, and if you insist that there is room for only 6, you must pay for the other 4 anyway." That is in the nature of an exaction from the employer for services which he does not want, does not need, and is not even willing to accept.

Only by ignoring the place of this statement in the context of the debate can it have the free-wheeling meaning which the court below imputes to it. After Senator Taft had made clear that the only forbidden demand was for "money for people who do not work," Senator Pepper ex-

pressed fear that such practices as call-in pay and paid rest periods would be banned, because each involves "a demand that payment be made for time when actually no work was performed" (93 Cong. Rec. 6446, in 2 Leg. Hist. 1545). Endeavoring to reassure his colleague of the continued validity of such payments, Senator Taft used the quoted example to illustrate the difference; both situations presupposed that no actual work was done, but Senator Pepper's example, unlike the lack of work depicted by Senator Taft's example, typified the kind of lack of work which was not outlawed because payment for it was not "in the nature of an exaction." That Senator Taft was referring only to payment to men who did not work may be discerned even if his example be taken in isolation from the debate. Thus, despite the fact that there was no "room" for the four musicians to play, and therefore they could not actually work, the employer "must pay for the other 4 anyway." Considered in the context of the debate—which showed (1) that the ban against causing the employment of unnecessary workers had already been rejected, (2) that only causing payment for not working was prohibited, and (3) that the colloquy between Senators Taft and Pepper was directed solely toward differentiating, in situations where concededly no work was performed, between legitimate and illegitimate bases for obtaining payment despite the failure to work—Senator Taft's example plainly presupposed that "the other 4" musicians would be paid for not working.

Any doubt is dispelled by later authoritative explanations. In an analysis of Section 8 (b)(6) which Senator Taft inserted in the Congressional Record, he referred to his debate with Senator Pepper, and explained that (93 Cong. Rec. 6859, in 2 Leg. Hist. 1623-24):[20]

> All that [Section 8 (b)(6)] does is to make it an unfair labor practice to cause or attempt to cause employers to pay money in the nature of an exaction for services which are not performed or not to be performed. A number of Senators have contended that this means that union requests for payment to employees of wages for lunch and rest periods or for waiting periods when machinery is being repaired will be illegal. * * * The use of the words "in the nature of an exaction" make it quite clear that what is prohibited is extortion by labor organizations or their agents *in lieu* of providing services which an employer does not want [Emphasis supplied.]

It is not procuring payment for *actual* work done which the employer "does not want" that is forbidden; it is compelling payment "in lieu" of performing unwanted work—the demand for money

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[20] The importance of this statement was highlighted by Senator Taft (93 Cong. Rec. 6858, in 2 Leg. Hist. 1622: "* * * in the course of the debate on the conference agreement on H. R. 3020 a number of arguments directed at specific provisions of the bill were made on the floor which were not justified by either the text of the bill or the background of statutes and decisions against which it was written. In addition, numerous completely erroneous statements were made with respect to the effect of certain portions of the bill. In order to make clear the legislative intent * * * I consider it advisable to supplement [my] analysis to cover some additional subjects and to correct mistaken statements made on the floor."

in place of, not for, work—which is banned. This is confirmed by Senator Ball, one of the managers of the amendments in the Senate and a member of the conference committee which formulated Section 8 (b) (6). On the last day of debate in the Senate, shortly before the vote which overrode the President's veto was taken, Senator Ball explained Section 8 (b) (6) in these words (93 Cong. Rec. 7529, in 2 Leg. Hist. 1639):

> There is not a word in [Section 8 (b) (6)] about "featherbedding". It says that it is an unfair practice for a union to force an employer *to pay for work which is not performed.* In the colloquy on this floor between the Senator from Florida [Pepper] and the Senator from Ohio [Taft], before the bill was passed, it was made abundantly clear that * * * it applied only to situations, for instance, where the Musicians' Federation forces an employer to hire one orchestra and then to pay for another stand-by orchestra, *which does no work at all.* [Emphasis supplied.]

It is clear, therefore, that Section 8 (b) (6) was enacted by Congress with the understanding that it "makes it an unlawful labor practice for a union to accept money for people who do not work," that it prohibits exacting money "in lieu" of performing unwanted work, and that it applies "only to situations" in which an employer is forced to pay someone who "does not work at all." There is nothing to support the view that once it is shown that actual work is to be performed, there must still be a further inquiry into whether the work is

wanted or needed by the employer. Were such an additional inquiry contemplated, at the least Congress would have retained so much of the House bill as forbade compelling the employment of more persons than reasonably required, which would be a minimum criterion for judging the need for work. But Congress studiously avoided this requirement. It felt that it was impracticable to give to a board or a court the power to say that so many men are all right, and so many men are too many. It would require a practical application of the law by the courts in hundreds of different industries, and a determination of facts which it seemed * * * would be almost impossible" (*supra*, p. 37).

To interpolate a criterion of need into Section 8 (b) (6), despite Congress' refusal to regulate the number of employees necessary to do a job, is to adopt a standard rejected by Congress. Once it is recognized that Congress refused to reach the question of the number of employees reasonably required, there is no other test which can be devised in terms of the usefulness of work or its economic profitability to the employer which does not raise the same objections which caused Congress to reject regulation of the number of workers. It is just as difficult to determine whether a disputed class of work is beneficial as it is to determine how many employees are necessary to perform a concededly useful class of work (*infra*, pp. 51-53). In this very case, for example, it is not at all clear that, in terms of economic utility or aesthetics, the work which the Union offered to do, some of which

it had done in the past (*supra*, p. 3), has no value (*infra*, pp. 49-51). From the employer's standpoint there is no greater detriment to him in being required to employ ten men to do the work of five than to hire five men to do work which he considers useless. The concept of "services" under the Act does not turn on advantage to the employer; the test is simply whether the union is in good faith offering to perform work for money or whether it is insisting on payment for performing no work. To look to whether the work is worthwhile from the employer's standpoint is to go beyond the simple statutory test whether the work is done or is to be done, and to mire the statute in all the difficulties which caused Congress to withhold all regulation of featherbedding except to require work.

Since the enactment of Section 8 (b)(6), Congress has not repudiated the Board's reading of its purpose. Indeed, in the 81st Congress, Senator Taft introduced (S. 249, 81st Cong., 1st Sess., in 95 Cong. Rec. 8506-8513), and the Senate passed (95 Cong. Rec. 8716-8717), a bill amending the Taft-Hartley Act which omitted Section 8 (b)(6). Senator Taft explained that: "The *limited* restriction on featherbedding is eliminated. Section 8 (b)(6)" (95 Cong. Rec. 5590, emphasis supplied). Had Section 8 (b)(6) regulated employment in terms of the employer's want or need for the work, it could hardly be described as a "*limited* restriction." And the proposal to eliminate Section 8 (b)(6) altogether indicates at the least the tentativeness and circumscription of Congress' original

approach to regulating featherbedding.[21] It evidences that the Board's interpretation is a faithful reading of Congress' carefully constricted purpose.[22]

The upshot of the matter, therefore, is perhaps best summarized by Senator Taft and Congressman Hartley, cosponsors of the amendments to the Act. In the foreword to Congressman Hartley's book "*Our New National Labor Policy*" (1948), Senator Taft prefaced a reiteration of his views concerning the limited scope of Section 8(b)(6) as follows: "There is a suggestion in Mr. Hartley's book that various desirable changes were omitted from the Senate bill simply to get enough votes to pass the bill over the President's veto. Of course, this was a consideration, but fundamentally the differences with the House were brought about by differences of principle" (p. xi). "The Senate Committee felt that our job was one of correcting inequalities in existing law, and that unless there was clearly a serious abuse to be remedied we had better not go too far into *experimental* fields" (p. xii, emphasis supplied). After citing several other examples to illustrate the differing philosophies of the House and Senate, Senator Taft continued: "So also, the

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[21] As shown (*supra*, p. 38-39), part of the reason assigned by Congress for withholding extensive regulation of featherbedding was to permit further study of the problem by the Joint Committee created by Section 401 of the Act. The ensuing report of that committee merely counseled further study. S. Rep. No. 986, 80th Cong., 2d Sess., Pt. 3, pp. 58-61.

[22] Cf., *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 923 (C.A. 6), certiorari denied *sub nom.*, *Ann Arbor Press, Inc.* v. *National Labor Relations Board*, 342 U.S. 859; *ANPA* v. *National Labor Relations Board*, 193 F. 2d 782, 800 (C.A. 7), certiorari denied on this question, October 13, 1952.

attempt to prohibit featherbedding requires an elaborate Federal investigation of conditions in each industry and the exercise by the government of an expert opinion of the number of men required to do each job. *The extreme case of paying men for doing nothing, made an unfair labor practice by the new law, can be more easily dealt with,* but there are literally thousands of borderline cases different in every industry which will require a vast extension of government regulation of labor and industry" (p. xiii). [Emphasis supplied.] Congressman Hartley in the text of his book agreed with Senator Taft that Section 8(b)(6) dealt only with "paying men for doing nothing." He specifically recognized that it does not cope with the situation in which an employer is required to "hire more men than are needed" (p. 183), or in which make-work practices are carried "beyond a point which can be economically justified" (p. 182). He therefore recommended that Section 8(b)(6) be amended so as to provide "more effective provisions against featherbedding practices" (p. 174). Thus far Congress has not seen fit to adopt Congressman Hartley's recommendations.

When the court below stated, referring to Senator Taft's example that there is no "room" for the four musicians to play (*supra*, p. 40), that the analogy between it and the present case "falls barely short of perfection and reaches it if we substitute 'need' for 'room'" (R. 398), it indulged in the same basic alteration of the legislative history of Section 8(b)(6) as it had of the text. Indeed, in the court below the Company disclaimed the

meaning which the Court attributed to Senator Taft's example. The Company stated that, "frankly, it appears to have been a momentary lapse on the Senator's part into the broader language of the Lea Act, to have been made in the heat of debate, and to be inconsistent with the true meaning of 'in the nature of an exaction' as used in the statute. . . ." (Reply brief, p. 6). We believe it is unnecessary to explain away Senator Taft's statement in this fashion, but, if the statement does have overtones inconsistent with the text of Section 8(b)(6) and the remainder of its legislative history, we believe that the Company has hit closer to the mark than the court. To suppose that Congress utilized Senator Taft's example as the route by which to incorporate a meaning into Section 8(b)(6) which it does not otherwise bear is "to bring into question the candor of Congress as well as the integrity of the interpretative process."[23]

C. Were the Employer's Want or Need for Work Pertinent, it Would be Necessary in Each Case to Ascertain Whether This Criterion Had Been Met; But Congress Intended Neither for the Board to Decide the Question Nor for the Employer's Unilateral Determination to Control; This Criterion is Therefore Obviously Irrelevant

While holding that the employer's want or need for work is pertinent, the court below failed to

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[23] *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, 508.

address itself to the irreconcilable dilemma which its interpretation of Section 8(b)(6) creates and which conclusively shows its error. If the employer's want or need for work is relevant, a decision of this question would be required in every case. It would be necessary either (1) to have the Board decide whether the work is desired or required, or (2) to permit the employer's unilateral determination to prevail. Neither alternative was acceptable to Congress. It therefore necessarily rejected any criterion of want or need, for it found no satisfactory means of resolving the issue.

The dilemma is vividly illustrated by the contrasting positions of the Company and the Union in this case. The Union sought actual work in two main categories, (1) the playing of overtures, intermissions, and "chasers" (*supra*, pp. 4, 6), and (2) in several variations as to circumstances, the providing of musical accompaniment to vaudeville acts (*supra*, pp. 6, 8-9). In the court below the Company did not challenge the usefulness of musical accompaniment to vaudeville acts, dismissing this class of work with the wholly unsupportable assertion that the Union "was not primarily interested in it" (Br. below, p. 30).[24] Concentrating solely on the Union's offer to play intermissions, overtures, and "chasers," the Company asserted that this

[24] Throughout the negotiations beginning in 1949, the Union continuously offered to play musical accompaniment for vaudeville acts, and readily assented to a contract on this basis proposed by the local management of the theatre, an arrangement which did not go into effect because it was vetoed by the Company's New York office (*supra*, pp. 6, 8-9). Obviously the Union was "interested" in this class of work.

class of work entailed no element of "constructive labor" (Br. below, p. 23), specifying "that the employer had no use for such intermissions or overtures, that they had been of no service to him, that they had no entertainment value, that they would not help to draw an audience and that they represented in fact a continuing interference in the operation of the theater" (Br. below, pp. 27-28). The Company concluded, therefore, that no "service" was to be performed because this work had no "utility, benefit, or desirability" (Br. below, p. 21), adding the flourishes that it was "unjustified" (Br. below, p. 32), it was an "insignificant and unwanted act" (Br. below, p. 33), and its unreasonableness merges into preposterousness" (Br. below, p. 32).

On the other hand, in an offer of proof rejected by the trial examiner, the Union took square issue with the Company's position on overtures, intermissions, and "chasers," offering at the hearing to prove that the "practice is economic" (R. 170), specifying that (R. 168-169):

> * * * the witness, if allowed to testify, would state that the Cleveland Palace Theatre does employ local musicians on such occasions as a travelling band plays at such theatre.
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> * * * * *
>
> The witness, if allowed to answer, would further state that on such occasions, the local orchestra plays an overture, during inter-

mission, and after the performance by the travelling orchestra.

* * * * *

The witness further, if permitted to testify along this line, would testify that the practice of employment of local musicians at the same time as a travelling orchestra plays in theatres is not uncommon in the entertainment industry.

It is thus evident that in virtually every case where a union's offer to work is rejected by an employer as unwanted or unneeded the worth of the work emerges as an issue to be resolved. The means by which to resolve such an issue presents so vexing a problem that it may itself be more fraught with danger than any abuse it may be designed to correct. As explained by an eminent economist (Slichter, *Union Policies And Industrial Management*, p. 199 (1941)):[25]

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[25] See also, *id.* at 165-166. And see, Randle, *Restrictive Practices of Unionism*, 15 So. Eco. Jour. 171, 181-182 (1948):

"In the case of restrictive labor policies, it is a great deal easier to diagnose than propose a remedy. * * * There does not appear to be any statutory method by which to describe the practices which are undesirable without at the same time prohibiting contractual provisions which are desirable and necessary. Any attempt to do so would bog down in sheer administrative unworkability. A different rule would have to be made for each case, and each decision might depend upon exceedingly technical and complex facts. The only direct method of public control would be some scheme which would provide for government dictation of nearly all the nonwage provisions of every collective bargaining agreement. But in addition, the government, to expose the "oral agreement" phase of restrictive practices, would need a Federal Bureau of Investigation whose size would create a sizable

If a union is charged with requiring the employment of an unnecessarily large crew on a machine or unreasonably limiting the number of pieces that a man may produce or the number of machines that he may run, how can "reasonableness" be determined? If a union were charged with forcing the employment of an excessive number of men on a new printing press, the court would have to decide the technical question of how many men the press really requires. This number will differ for the same press in different press rooms or under different working conditions. Likewise, the courts might be compelled to decide how many looms a weaver should operate (and the number would differ with a multitude of conditions, such as the nature of the work, the nature of the machines, the kind and amount of help provided), what is a reasonable sling load under different conditions in loading and unloading ships, what are reasonable limits on the daily output of workmen in hundreds of occupations. The public policy of seeking to regulate such technical matters by law is open to grave doubts. These doubts are increased by the fact that there is a possibility of regulating

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dent in the national budget. Then there remains the question of how you would visit judicial displeasure upon the culprits. To levy fines would be one sure way to lower worker morale and raise antagonisms which would be immediately reflected in productivity. The other alternative of jailing the culprits would stop all production. It seems obvious that legislative efforts would present an enforcement conundrum to which no one has an adequate answer."

them through the bargaining power of employers.

Impressed by these "grave doubts," Congress found no feasible means to decide the employer's want or need for work. It refused to have that question resolved by either the Board or the employer, and the deliberate absence of a means of deciding this issue, vital to the holding below, necessarily demonstrates its irrelevance.

1. *Congress expressly formulated Section 8 (b) (6) to avoid conferring on the Board the function of deciding disputes as to the want or need for work.*

To confer on the Board the function of deciding whether work is wanted or needed by an employer, where a union seeks actual employment for its members, is to cast the Board in the very role which Congress refused to assign it. As shown (*supra*, pp. 36-37), Congress deleted from the House bill the prohibition against seeking employment in numbers larger than "reasonably required." As Senator Taft explained (*supra*, p. 37), the conferees "felt that it was impracticable to give to a board or a court the power to say that so many men are all right, and so many men are too many. It would require a practical application of the law by the courts in hundreds of different industries, [and in "all kinds of functions" (*supra*, p. 38),] and a determination of facts which it seemed * * * would be almost impossible." Thus the impossibility of

administering even a "reasonably required" standard led to its deletion. To require the Board, nevertheless, to decide whether an employer wants or needs work is to vest it with the power Congress chose to withhold.

Furthermore, if administration by the Board of a "reasonably required" standard is "impracticable" and "almost impossible," how much more so are the elusive and epithetic standards the Company proposes to substitute, such as "unreasonableness" merging into "preposterousness," "unjustified," "insignificant and unwanted," without "utility, benefit, or desirability" (*supra*, p. 50). These are not the standards stated in Section 8 (b) (6); they exceed in latitude any curb on featherbedding which any proponent in Congress ever proposed; and they infinitely multiply the mischief in administration which led Congress to reject the much more explicit "reasonably required" test. To inject the Board into this area would indeed be, contrary to the will of Congress, to have the Board "sit in judgment upon the substantive terms of collective bargaining agreements." *National Labor Relations Board* v. *American National Insurance Co.*, 343 U. S. 395, 404.

2. *The employer's unilateral determination of the want or need for work does not control.*

Under the general scheme of the National Labor Relations Act, the only alternative to having the Board decide whether the employer wants or needs

work is to permit the employer's unilateral determination of this issue to control. So to do "would be to accept the employers' requirements, no matter how harsh and extreme, as the proper standard."[26] This alternative was no less unacceptable to Congress.

The conferees, in their consideration of the wise scope of featherbedding regulation, presupposed that the Board and not the employer would decide the question of need if legislation were to extend that far (*supra*, pp. 37-39). Otherwise there would have been no purpose to their discussion of the infeasibility of governmental determination of need for employment. Furthermore, the report accompanying the House bill, which forbade unneeded employment, clearly implied that an employer's need for workers was to be determined, not by the employer himself, but by an impartial application of objective standards (H. Rep. No. 245, 80th Cong., 1st Sess., 25, in 1 Leg. Hist. 316):

> In the case of * * * paragraph (A), in every industry standards exist and are applied daily to determine how many employees are "reasonably required" to perform given tasks. * * * When any question arises as to whether or not a union demands more people than are "reasonably required" to do certain work, industrial engineers and time-study people

[26] Slichter, *Union Policies and Industrial Management*, p. 166 (1941).

can, and constantly do, resolve the question by reliable, scientific methods.

In addition, reference to the Lea Act "from which the House language was taken" (93 Cong. Rec. 6443, in 2 Leg. Hist. 1540), conclusively establishes that it was never proposed that the employer's own view of his want or need for work should be decisive. Paragraph (1) of the Lea Act parallels paragraph (A) of the House bill, with the exception that reference is there made to "the number of employees needed" rather than those "reasonably required" (*supra*, p. 34, n. 16). The employer's statement of his "wants" or desires for work under the "need" test of the Lea Act, plays no part in determining the legality of a request for employment,[27] and it was settled by this Court

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[27] The Lea Act was specifically amended on the floor of the House to achieve this result. As originally reported to the House by the Committee on Interstate and Foreign Commerce, paragraph (a)(1) made it unlawful to coerce a radio licensee "to employ * * * persons in excess of the number of employees *wanted* by such *licensee*." [Emphasis supplied.] This provision was criticized on the ground that it would permit an employer to overburden his employees and prevent them from seeking to induce him to lighten their burdens by increasing the size of the working force (92 Cong. Rec. 1546). Subsequently, Representative Holifield offered an amendment which would strike the words "wanted by such licensee," and substitute "needed by such licensee to perform actual services" (92 Cong. Rec. 1564). This amendment was passed by the House without debate and was later accepted by the Conference Committee. During the debate in the Senate on the Conference Report, Senator Johnson, in charge of the measure, stated flatly that it was not the radio station which determined the appropriate number of employees (92 Cong. Rec. 3245, 3256), reassuring the Senate as follows: "I think it should be said in connection with what the Senator from Vermont has already so well stated, that while the bill was being con-

that "an employer's statements as to the number of employees 'needed' is not conclusive as to that question," but it must be determined by a jury on the basis of "many factors." *United States* v. *Petrillo*, 332 U.S. 1, 6, 7.[28] It is at the least clear that Section 8 (b) (6) was never intended to exceed the Lea Act in the stringency of its control over a union's demand for employment; since the em-

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sidered in the House the word was changed from employee 'wanted' to employees 'needed'. That is a very important change. But that change was made, and the conference report and the measure now contain the word employees that are 'needed'; not employees that are wanted, but employees that are needed." (92 Cong. Rec. 3245).

[28] The constitutionality of paragraph (1) of the Lea Act was upheld by this Court against the charge that the words "number of employees needed by such licensee" was so vague, indefinite, and uncertain as to violate the due process clause of the Fifth Amendment. The District Court, from whose decision appeal was taken, had held that portion of the Lea Act unconstitutional for the reason that "There is no means, or guide, or standard by which the defendant may know 'the number of employees needed.' This is established by the licensee without prior knowledge upon the part of the person subjected to prosecution for violation of the section." *United States* v. *Petrillo*, 68 F. Supp. 835, 848 (N. D. Ill.) In reversing the lower court, this Court made it clear that the "number of employees needed" was to be determined judicially, rather than by individual employers, as the following excerpt from the opinion indicates: "Of course, as respondent points out, there are many factors that might be considered in determining how many employees are needed on a job. But the same thing may be said about most questions which must be submitted to a fact-finding tribunal in order to enforce statutes. Certainly, *an employer's statements as to the number of employees 'needed' is not conclusive as to that question.* It, like the alleged wilfullness of a defendant, must be decided in the light of all the evidence. * * *. the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for *judges and juries fairly to administer the law in accordance with the will of Congress.*" *United States* v. *Petrillo*, 332 U.S. at 6 and 7. [Emphasis supplied.]

ployer's unilateral determination does not control under the Lea Act, it cannot so control under Section 8 (b) (6). Finally, it is offensive to the underlying spirit of the Act to say that, in a dispute between an employer and a union over the want or need for work, an employer may illegalize the union's demand merely by rejecting it, for the Act normally withholds from either party the force of governmental support of their substantive bargaining positions. *National Labor Relations Board* v. *American National Insurance Co.*, 343 U. S. 395, 401-404.

Accordingly, since Congress withheld both from the Board and the employer the power to decide the issue, the employer's want or need for work is necessarily irrelevant in determining the legality of a union's request for employment.

D. By Its Interpretation of Section 8(b)(6) the Court Below Has Substituted Its Conception of the Public Policy Pertinent to Featherbedding for That of the Congress

To support its interpretation of Section 8(b)(6), the court below states that to make the application of Section 8(b)(6) turn on the distinction between working and not working is "to ascribe to Congress a purpose to condemn certain practices in labor relations and at the same time to use a form of expression that permits escape from its condemnation" (R. 398). But the difference between receiving payment for working and payment for not working is more than a matter of mere syntax. *United States* v. *Local 807*, 315 U.S. 521, 534. Congress

regulated featherbedding practices to the extent of requiring that work be performed, but it left to the process of bargaining the determination whether the employer should accede to a demand for work and the manner in which work should be done to yield the employer the greatest benefit. There has been no other change from the policy whereby Congress has placed its faith in "the bargaining power of employers" to regulate featherbedding. Slichter, *Union Policies and Industrial Management*, p. 199 (1941).

The reform which Congress effectuated is illustrated by this case. In obedience to the command of Section 8(b)(6), the Union abandoned its earlier practice of securing the payment of employees although no work was done by them (*supra*, p. 4). The evil corrected was the elimination of this practice. The Union now seeks payment only in exchange for actual work done. According to counsel for the Union (*supra*, p. 9), as a result of negotiations on this basis, an agreement has been reached between the Company and the Union for the actual employment of local musicians on half of the total of stage presentations booked by the theater each year. But whether or not such an agreement has materialized, what is pertinent is that bargaining now proceeds on the basis of the actual performance of work, and this is the reform which Congress instituted.

To interpret Section 8(b)(6) as directed only at requiring work does not, as the court below seems to imply, permit easy evasion of the statute's actual prohibition against obtaining payment for *not*

working. A union's mere statement that it proposes to perform work is not conclusive of the *bona fides* of its offer. Like every other question of fact, whether the union is actually in good faith offering to perform work must be evaluated in the light of all the circumstances. Whatever a union's professions may be as to its desire to secure actual employment, "the inquiry must nevertheless be directed to whether . . . [it] honestly intended to obtain a chance to work for a wage." *United States* v. *Local 807*, 315 U. S. 521, 534. In this case, the Board found, after assessing all the evidence, that the Union did honestly intend to perform the work it sought, and this finding was not disturbed by the court below. As we have shown, (*supra*, pp. 18-26), this finding is supported by substantial evidence on the record considered as a whole.

By requiring only that work be performed, and not extending its prohibition against unwanted or unneeded work as well, Congress approached the subject of featherbedding regulation mindful of the difficulty of the problem and the division of opinion concerning its attributes and solution. At the root of featherbedding is the unemployment resulting from technological innovation.[29] From

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[29] See *Digest of Material on Technological Changes, Productivity of Labor, and Labor Displacement*, 35 Monthly Lab. Rev. 1031 (1932). As to the effect of technological change upon the employment of musicians, see, *Effects of Technological Changes Upon Employment in the Amusement Industry*, 33 Monthly Lab. Rev. 261 (1931); *Effects of Technological Changes Upon Employment in the Motion-Picture Theaters of Washington, D. C.*, 33 Monthly Lab. Rev. 1005 (1931).

the time that mass-production machinery was first introduced,[30] those adversely affected have resisted displacement, protesting its privation,[31] while those profiting from it have defended it as advancing progress. This conflict between security and change has evoked much controversial discussion but no pat or ready bases have been found either for reconciling the competing interests or for preferring the one to the other. As stated in the introduction to an exhaustive study (TNEC Monograph 22, *Technology In Our Economy*, p. 3 (1941)):[32]

> It is now more than a decade and a half since the phrase "technological unemployment" was coined in the United States. In its first coinage the phrase was meant to convey the idea that technical progress was a factor in decreasing employment and that society was being confronted more and more with the problem of "machines versus men." In the 15 years since the phrase became common cur-

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[30] Towards the end of 1811 the Luddites, English handicraftsmen displaced by the introduction of textile machinery, destroyed stocking and lace frames as a measure of resistance. 14 Ency. Brit. 468 (1948). See Toller, *The Machine Wreckers* (Knopf, 1923), and also Lord Byron's eloquent speech in defense of the Luddites in the House of Lords on the second reading of the Frame-Work Bill (*id.*, at pp. 105-113).

[31] Of course, resistance to displacement by the adoption of restrictive tactics is not confined to workers, but extends to every group in society whose stake is threatened by a change. Randle, *Restrictive Practices of Unionism*, 15 So. Eco. Jour. 171, 178 (1948).

[32] See also, Slichter, *Union Policies and Industrial Management*, pp. 164-281 (1941); Randle, *Restrictive Practices of Unionism*, 15 So. Eco. Jour. 171 (1948); *Technology*, 14 Ency. Soc. Sc. 553, 557 (1934); *Unemployment*, 15 Ency. Soc. Sc. 147, 153, 157-158 (1934).

rency in this popular sense, an almost incessant debate—sometimes more and sometimes less heated—has been going on as to what the phrase really meant; whether what it meant to denote was a fact or a "mere figment of the imagination"; if a real fact, how serious was it for national welfare and what could or should be done about it. What has been said on both sides of the question is registered in an extensive literature—in the technical discussions of the American statistical and economic associations, in numerous articles in the more or less popular magazines, in editorials in the trade press, in voluminous reports and studies of private research agencies and governmental bureaus, and in the elaborate depositions and statements made in public hearings held by congressional committees and by other official or semiofficial bodies.

It cannot be said that this rather prolonged debate has settled the main issue raised. Today, as a decade ago, opinion in the United States is still divided between the opposing views that may be held on the subject. On the one hand, it is still claimed by some that the factor which is of special significance in making the problem of unemployment what it is today is that of technology. Not only the number of the unemployed, but their distribution by occupations, the duration of their unemployment, and their chances for being reemployed are presumably influenced in large measure, if not primarily, by the technological changes which have been taking place during

> the past two decades and which promise to continue in the discernible future. On the other hand, there are those in this country as well as abroad who either deny the existence of technological unemployment entirely or regard it as of minor importance. To many of these the very term is a misnomer whose use merely tends to confuse the real issues.
>
> This division of opinion, which is as old as the problem itself, would seem to point to underlying differences in general economic views which cannot seemingly be bridged.

Faced with this unreconciled underlying antagonism of interests, Congress was not yet prepared to throw the force of governmental support to either side in the dispute, and therefore, except for requiring that work be performed, Congress withheld all regulation of featherbedding. Hence, for the court below to say that the same vice may arise from the unregulated as from the regulated area is to ignore the point at which Congress chose to stop. Congress fully appreciated the distinction between stand-by and make-work practices in featherbedding. Stand-by practices require payment where no work is done. These Section 8 (b)(6) forbids. Make-work practices concern payment for actual work which the employer considers of no value. These Section 8 (b)(6) does not reach.

The failure of the court below to appreciate Congress' circumspect approach to featherbedding underlies and annuls another justification ad-

vanced by it to support its interpretation of Section 8 (b) (6). It asserts that, while the result of its interpretation is that "the field of activity for a small orchestra may be somewhat curtailed," "at the same time the market for the services of much larger musical organizations is greatly enhanced" (R. 398). This is an irrelevant consideration, even if it were correct. The membership of the American Federation of Musicians is composed of musicians playing for both small and large orchestras and the policy it adopts presumably represents its considered accommodation of the interests of both, reached and embraced by both. Neither the Board nor the courts can presume to know the best interests of different groups within a union better than they know them themselves. Nor have the Board or the courts been assigned to mediate the conflicting interests within or between the ranks of management and labor. On the contrary, it was precisely because Congress was unwilling to have governmental intercession in such disputes that it withheld regulation of featherbedding except to require that work be done.

Finally, it may be suggested, as did the dissenting member of the Board, that while Section 8 (b) (6) does not reach unwanted or unneeded work when the work is done by employees already in the employer's hire, it does prohibit unwanted or unneeded work where its performance is sought by workers who are not presently on the employer's payroll (R. 382-383). But just as Section 8 (b) (6) draws no distinction between work already

performed and work to be performed (*supra*, p. 28). Section 8 (b)(6) draws no distinction between the work demands of present and prospective employees. Its text treats an existing and a future employment relationship in identical fashion, for it covers causing an employer "to . . . agree to pay . . . for services . . . not to be performed," which clearly reaches prospective employment and affords no basis for differentiating it from existing employment. Furthermore, as this Court has agreed, "'practically always the crux of a labor dispute is who shall get the job, and what the terms shall be. . . .'" *United States* v. *Local 807*, 315 U.S. 521, 531. This is especially true in many important industries, such as maritime, stevedoring, and the building and constructing trades, where employers ordinarily do not have a fixed work force but recruit employees as required on a particular job. Had Congress put this class of employment in a separate category from that in which a fairly permanent employment relationship is usual, a clear expression of such an intention most certainly would have appeared. No such expression is present. Certainly every reason deterring Congress from regulating unwanted or unneeded work in an existing employment relationship applies with equal force to prospective employment.

The same is true of the distinction which may conceivably be suggested between work of a kind which the employer has had done in the past and work of a new kind which a union may seek to have

the employer institute. The employer who wishes to abolish a preexisting class of work because he finds it unprofitable or useless is not protected by the statute against union demands that he continue to have it performed. An employer who for the same reasons does not desire to institute a new class of work is in no different position. Section 8 (b) (6) places a union under no greater disability in seeking to expand job opportunities which did not previously exist than it is in seeking to prevent curtailment of preexisting job opportunities. To secure future employment and to retain present employment remain legitimate union aims.

A union's attempt to institute a new class of work, as distinguished from retaining present employment, may be relevant to the factual question whether it in good faith intends to perform the work it proposes be adopted—but only to this question. It is solely in this connection, to test the *bona fides* of the union's offer, that it may be appropriate to inquire into the relationship of the proposed work to the employer's usual business. In this case, the Board was clearly warranted in concluding that the Union intended to perform the work it sought (*supra*, pp. 18-26). Indeed, the Union was not seeking the adoption of a new class of work it had never theretofore performed, but was seeking to reacquire a former class of work it had relinquished and now desired to resume (*supra*, pp. 3-6).

In any event, there is no need to reach on this record any number of hypothetical situations which

might be conjured up by *ad horrendum* arguments. Assuming that the touchstone of Section 8(b)(6) is the word "services," it is clear that whatever limitations might be placed upon that word *arguendo* they do not exclude work which is within the competence of the union to perform, is not precluded by the physical nature of the premises, and is within the general scope of the employer's business.

In sum, by its approach to the interpretation of Section 8 (b)(6), the court below has overlooked a vital element of the legislative process. "Legislation is often tentative, beginning with the most obvious case, and not going beyond it, or to the full length of the principle upon which its acts must be justified." Mr. Justice Holmes in *Beard* v. *Boston*, 151 Mass. 96, 97, 23 N. E. 826, 827. It is this "cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation." *Carroll* v. *Greenwich Insurance Co.*, 199 U.S. 401, 411. This approach is characteristic of the amendments to the Act. In "a matter of such bitter controversy as the Taft-Hartley Act, the product of careful legislative drafting and compromise beyond which its protagonists either way could not force the main body of legislators, the courts should proceed cautiously." *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906, 912 (C. A. 2). "Congress could have outlawed all so-called 'featherbedding' but apparently did not see fit to do so." *American Newspaper Publish-*

ers Association v. *National Labor Relations Board*, 193 F. 2d 782, 801 (C. A. 7), certiorari granted, this Term, No. 53. To adopt the interpretation of the court below "would warp § 8(b)(6) into a broader provision than it was intended to be." *Rabouin* v. *National Labor Relations Board*, *supra*.

CONCLUSION

For the reasons stated it is respectfully submitted that the decision below should be reversed and the case remanded with directions to affirm the order of the Board and deny the petition to review.

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel.

DAVID P. FINDLING,
Associate General Counsel.

MOZART G. RATNER,
Assistant General Counsel.

BERNARD DUNAU,
Attorney,
National Labor Relations Board.

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